UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: September 17, 1998 Decided: October 5, 1998)

Docket No. 97-9581

SUPREME OIL COMPANY,

Plaintiff-Appellant,

—v.—

METROPOLITAN TRANSPORTATION AUTHORITY, METRO-NORTH COMMUTER RAIL DIVISION and NEW YORK CITY TRANSIT AUTHORITY,

Defendants-Appellees.

Before:

KEARSE, *Circuit Judge,*
BRIEANT and JOHNSON, *District Judges.**

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* Honorable Charles L. Brieant, of the United States District Court for the Southern District of New York, and Honorable Sterling Johnson, Jr., of the United States District Court for the Eastern District of New York, sitting by designation.

Appeal by plaintiff Supreme Oil Company from an order entered by the United States District Court for the Southern District of New York (Denise Cote, *Judge*) on September 30, 1997, granting summary judgment in favor of defendants, Metropolitan Transportation Authority, Metro North Commuter Rail Division and New York City Transit Authority. The district court held the New York City Department of Housing Preservation and Development did not abuse its discretion in denying Supreme Oil Company's claim for relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601.

Affirmed.

LEO J. KIMMEL, Brooklyn, NY, for *Plaintiff-Appellant.*

ANTHONY P. SEMANCIK, New York, NY for *Defendants-Appellees.*

PER CURIAM:

I.

In 1979 the City of New York, on behalf of the New York Transit Authority ("NYTA"), condemned Supreme Oil Company's ("Supreme") Queens, New York, factory as part of a project to construct a new subway line. Supreme searched for a site to relocate its business, and eventually purchased the lot at 80 South Dean Street in

Englewood, New Jersey ("Lot 2"), to which Supreme moved in 1981.

The subway project that forced the condemnation of Supreme's location in Queens was funded in part by a grant to the Metropolitian Transportation Authority ("MTA") from the United States Urban Mass Transportation Administration, an agency within the United States Department of Transportation. Due to this arrangement, Supreme was eligible to apply for relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("URA") which provides compensation to individuals and businesses displaced in the course of federally funded projects. *See* 42 U.S.C. § 4601 *et seq.* The URA provides, in pertinent part, that "the displacing agency" shall make payment to the displaced "person" of:

> (1) actual reasonable expenses in moving himself, his family, business, . . . or other personal property;
>
> (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business . . . but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property as determined by the head of the agency;
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> (3) actual reasonable expenses in searching for a replacement business. . .

42 U.S.C. § 4622(a).

In order to receive federal funds for projects, such as the subway construction that forced Supreme's displacement, state and local agencies must certify that they will provide relocation benefits under the URA to

affected persons and businesses. *See* 42 U.S.C. § 4604. The grantee agency may contract with another public or private agency to administer the relocation benefits, but the actual grantee remains at all times responsible for assuring that the federal funds are disbursed in compliance with the URA. In this case, MTA, the grantee agency, entered into a third-party contract with the New York City Department of Housing Preservation and Development ("HPD"), to administer URA claims and payments on MTA's behalf.

Following its relocation to Englewood in 1981, Supreme filed several claims for URA benefits with HPD. Through 1984, HPD paid Supreme a total of $693,367.31 for three separate relocation claims. The first $430,991.31 of these payments was for two separate moving cost claims and the remaining $261,376 was for a "Physical Change Claim" stemming from Supreme's construction of off-street parking and related outdoor improvements at the Lot 2 relocation site. The payment for Supreme's moving expenses is not the subject of the parties' present dispute. The Lot 2 Physical Change Claim, however, is directly related to the present appeal.

On October 26, 1982, Supreme sought and obtained approval for its relocation site from the Englewood Planning Board. Upon receiving this approval, Supreme was then required to obtain a Certificate of Occupancy ("C/O") for the new location. On January 4, 1985, Englewood issued a C/O to Supreme for Lot 2.

In August of 1985, Supreme purchased a lot adjacent to Lot 2, located at 100 South Dean Street ("Lot 3"). On October 31, 1988, Supreme formally filed a Second Physical Change Claim with HPD, seeking benefits for work contemplated on the combined Lot 2/Lot 3 site. For

purposes of this litigation, the parties entered into a stipulation dated March 6, 1997, stating that HPD did approve and recommend payment for at least part of Supreme's Second Physical Change Claim. In October of 1989, HPD sought the necessary funds from MTA to pay this claim. MTA, however, refused to advance these funds.

Eventually, HPD Assistant Commissioner Peter Cantillo requested that Al Shehadi, the department Director of Operations, prepare a final agency determination on Supreme's Second Physical Change Claim. After examining the documentation relating to the claim and meeting with representatives from Supreme, Shehadi concluded that the claim should be rejected in its entirety because it was not directly related to Supreme's initial relocation as required under the URA.

Soon thereafter, Supreme requested and was granted the opportunity to appeal Shehadi's final agency determination denying compensation for its Second Physical Change Claim. An HPD attorney, Al Schmidt, was initially assigned as a hearing officer in this administrative proceeding, but he was soon replaced by Roslyn Gottlieb. Schmidt, however, subsequently served as an attorney to MTA during this administrative hearing held before Gottlieb. Gottlieb affirmed Shehadi's denial of the claim for many of the same reasons as Shehadi, but also considered information and issues not known nor addressed by Shehadi. Most significantly, she had available testimony and documents concerning the C/O for Lot 2 issued to Supreme in January of 1985 permitting her to find that Supreme had withheld evidence of having obtained the C/O, and that Supreme had already complied with all legal requirements for occupancy, leaving it ineligible for further reimbursement.

In July of 1996, Supreme commenced a proceeding in New York State Supreme Court to appeal HPD's denial of its claim. On July 7, 1996 that action was removed to the Southern District of New York. In an order filed October 2, 1997, the district court granted defendants' motion for summary judgment and dismissed Supreme's claim in its entirety.

II.

It is well established that on appeal from a grant of summary judgment on a claim brought under the Administrative Procedure Act ("APA"), we review the administrative record *de novo* and accord no deference to the decision of the district court. *City of New York v. Shalala*, 34 F.3d 1161, 1166 (2d Cir. 1994). Under the APA, a federal court may set aside an agency's findings, conclusions or actions only if they are "arbitrary, capricious, an abuse of discretion, . . . otherwise not in accordance with the law," or "unsupported by substantial evidence." 5 U.S.C. §§ 706(2)(A) and (E). We thus review an agency's determination as would a district court, which means that we will set aside an agency's findings "only if they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.' " *Henley v. Food and Drug Admin.*, 77 F.3d 616, 619 (2d Cir. 1996).

Review of an administrative agency's denial of URA relocation benefits is under this narrow "arbitrary, capricious, . . . abuse of discretion standard." *See* 5 U.S.C. §§ 706(2)(A) and (E); *see also Ackerly Comm. Of Florida, Inc. v. Henderson*, 881 F.2d 990, 991 (11th Cir. 1989) (holding that Congress intended that agency

decisions under the URA be reviewed under section 706 of the APA); *Nagi v. United States*, 751 F.2d 826, 828 (6th Cir. 1985) (reviewing administrative agency's actions in denying benefits under the URA under the standards set forth in the APA §§ 706(2)(A) and (E)). We choose to follow the holdings of these circuits and apply an abuse of discretion standard in reviewing the denial of URA relocation benefits to Supreme.

Reviewing *de novo* the district court's decision under the same deferential APA standard applied by the district court, we conclude the decision by HPD to deny Supreme's claim on the Second Physical Change Claim was neither arbitrary nor capricious. First, the work performed in connection with the Second Physical Change Claim was not compensable because it was not the "direct result" of, or reasonably related to, Supreme's 1981 relocation from Queens, New York. *See* 42 U.S.C. §§ 4622(a) and 4601(6)(A)(ii)(I). The hearing officer's determination that the installation of new outdoor improvements under the 1987 Site Plan were not the direct result of Supreme's relocation to the Englewood site was based on substantial evidence in the record. Supreme contends that the 1987 Site Plan included different and additional requirements that were caused solely by unforeseen traffic problems outside its new plant and which the City of Englewood mandated as a prerequisite to issuing a final certificate of occupancy. The installation of new outdoor improvements under the 1987 Site Plan were not the direct result of Supreme's relocation to the Englewood site. In fact, the 1987 Site Plan was the result of Supreme's decision to expand its business by purchasing Lot 3 in 1985, combining it with Lot 2 and adding new site improvements. In other words,

the claim was not based on conditions that existed at the time of Supreme's move to Englewood.

We agree with defendants that Congress did not intend the URA to put a business in a better position in the relocation site than the position occupied at the original site and, accordingly, a business relocatee is not entitled to compensation for expenses that constitute an enhancement. As the URA's legislative history suggests, the maximum compensation payable for a relocation claim is set by what improvements the claimant lost at its original site:

> A person displaced from a business or farm operation may be compensated for actual direct property losses, whether he discontinues or reestablishes his operation. However, the maximum amount of any such payment may not exceed the reasonable expenses that would have been required to relocate the property, and in the case of heavy machinery, equipment, or other property involving substantial sums, also should not exceed the in-place value of such property.

H.R. Rep. No. 91-1656 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5850, 5856.

Nothing under the URA suggests a continuing obligation on the part of the federal government to pay for a business expansion or to comply with local codes after the business' initial relocation. As such, the district court properly "defer[ed] to a permissible interpretation espoused by the agency entrusted with the [URA's] implementation." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993).

Second, Supreme's entitlement to relocation benefits ceased when it received its C/O for Lot 2 in 1985. As the district court noted, "the most damning evidence in the administrative record, of course, is the fact that Supreme was issued a C/O for Lot 2 in January 1985." The New Jersey Uniform Construction Code Act provides that "[a] certificate of occupancy shall be issued by the enforcing agency when *all* the work covered by a construction permit shall have been completed in accordance with the permit, the code and other applicable laws and ordinances." N.J. Stat. § 52:27D-133 (emphasis added). Therefore, HPD's obligations to Supreme under the URA were satisfied when Supreme received its C/O for Lot 2 in January of 1985. Because it was neither arbitrary nor capricious for HPD to conclude that Englewood's 1985 issuance of a C/O barred Supreme's Second Physical Change Claim, the district court correctly upheld the administrative decision in this case. *See Coalition of New York State Career Schs., Inc. v. Riley*, 129 F.3d 276, 279 (2d Cir. 1997) (an agency's construction of a statute "will be upheld so long as it is plausible and does not otherwise conflict with Congress' expressed intent").

Finally, Supreme argues it was denied procedural due process by HPD and MTA in its review of Supreme's URA claim. Most troubling of these alleged due process violations was Supreme's contention that HPD attorney Al Schmidt, whom HPD initially appointed as the hearing officer for Supreme's administrative appeal and who was replaced by Roslyn Gottlieb, later became the attorney for HPD. Notwithstanding this inappropriate participation of attorney Schmidt in the administrative appeal, there is no showing of a due process violation which led to any prejudice to Supreme, since it shows no entitlement to federal funding for an expansion of its

operations, and "a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status." *Weinberger v. Salfi*, 422 U.S. 749, 772 (1974).

III.

For the reasons stated above, we affirm the decision of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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96 CIV. 5169 (DLC)

SUPREME OIL COMPANY,

Plaintiff,

—v.—

METROPOLITAN TRANSPORTATION AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

APPEARANCES:

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OPINION and ORDER

DENISE COTE, District Judge:

Defendants Metropolitan Transportation Authority ("MTA") and New York City Transit Authority ("NYCTA") move pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment affirming a final administrative decision of the New York City Department of Housing Preservation and Development ("HPD") to deny payment to plaintiff Supreme Oil Company ("Supreme") of certain construction expenses and relocation benefits for which Supreme had applied under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("URA"), 42 U.S.C. § 4601 *et seq.* As explained below, because HPD's denial of the benefits was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law within the meaning of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, and is supported by substantial evidence in the administrative record, the defendants' motion for summary judgment is granted.

PROCEDURAL BACKGROUND

HPD denied Supreme's claim for URA benefits by way of a final agency determination dated January 12, 1993, which was in turn based upon the December 22, 1992 departmental memorandum of HPD's Director of Operations, Al Shehadi, summarizing Supreme's claim and setting forth the reasons for its denial. Supreme subsequently requested and was granted an evidentiary and adversarial hearing to review the denial of its claim. The hearing, before HPD-appointed hearing officer Roslyn Gottlieb, commenced in November 1993 and included at least ten days of testimony and document production over the next 14 months. In a decision dated August 10, 1995, the hearing officer affirmed in full HPD's denial of Supreme's claim. HPD assistant commissioner Peter Cantillo then reviewed and affirmed the hearing officer's findings and

conclusions, and communicated the definitive denial of the claim to Supreme in a letter dated January 11, 1996.

Supreme thereafter commenced a proceeding in New York State Supreme Court under Article 78, N.Y. C.P.L.R. § 7801 *et seq.*, to appeal the administrative denial of its claim. That action was removed to this Court on July 10, 1996. By way of a Consent Order dated September 3, 1996, the Court dismissed Supreme's action with prejudice as to several original defendants, including the City of New York, and granted Supreme's motion to amend its pleading to add MTA as a party-defendant and to replead the action as a plenary claim for relocation benefits under the URA. Supreme filed an Amended Complaint on September 11, 1996, and a Second Amended Complaint on September 30, 1996, asserting subject matter jurisdiction under the URA and on the basis of the diversity of citizenship of the parties. Supreme's sole claim was for $276,476 (plus interest, costs, and fees) that it contended it was owed under the URA.

FACTS

Supreme, a manufacturer of salad oils and other condiments, is a Delaware corporation with its principal place of business in New Jersey. For approximately 20 years, Supreme operated out of a rented site in Richmond Hills, Queens County, New York. The Queens factory contained 19.874 square feet of space, almost completely occupying the lot on which it was located.

In 1979, the City of New York, on behalf of NYCTA, condemned Supreme's factory as part of a project to construct a new subway line. Supreme searched for a site to relocated its business, and eventually purchased a lot at 80 South Dean Street in Englewood, New Jersey, to which Supreme moved in 1981. The site at 80 South Dean Street, known as "Lot 2," covered 159,074 square feet of space, of which 44,794 square feet were taken up by the factory building, leaving 114,280 square feet of vacant space at the site. In a separate action in

New York State Supreme Court, Supreme recovered $430,000 plus interest from the City of New York in settlement of Supreme's claim for the value of trade fixtures abandoned at the Queens plant following the City's condemnation.

The subway project that forced the condemnation of Supreme's location in Queens was funded in part by a grant to MTA from the United States Urban Mass Transportation Administration ("UTMA"),[1] an agency within the United States Department of Transportation ("USDOT"). Because of this arrangement, Supreme became eligible to apply for relocation benefits under the URA, which provides certain forms of compensation to individuals and businesses displaced in the course of federally-funded projects. The URA provides in relevant part that the "displacing agency" shall make payment to the displaced "person" of:

> (1) actual reasonable expenses in moving himself, his family, business, . . . or other personal property;
>
> (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business[,] . . . but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency;
>
> (3) actual reasonable expenses in searching for a replacement business . . . .

42 U.S.C. § 4622(a).

Agencies such as USDOT promulgate implementing regulations specifying the eligibility requirements, claims procedures, and available benefits under the URA. *See, e.g.*, 49 C.F.R. § 24.1 *et seq.* (1997). In addition, other agencies, such as UMTA, publish circulars intended to assist state and local grant-recipient agencies in interpreting and applying the URA and its implementing regulations. For example, UMTA Circular 4530.1, in effect at the time of Supreme's displacement and relocation, states that its purpose is

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[1] UMTA was renamed the Federal Transit Administration in 1992.

> to provide guidance to Grantees of mass transit projects . . . to meet the requirements of the [URA], by identifying, summarizing and adapting the requirements imposed by referenced authorities on projects involving land acquisition and/or the relocation of persons, businesses, [etc.].

The circular cautions, however, that

> [t]o the extent that words of mandatory import appear in the text of the manual, those words used in paraphrasing the statutes or regulations and otherwise should be read in an advisory sense only. In the event that differences of interpretation arise, the statutes and regulations [such as the URA] must be consulted for resolution.

A subsequent section of UMTA Circular 4530.1, entitled "Exclusions on Moving Expenses and Losses," provides that "[t]he following expenses are ineligible costs under UMTA on 'actual moving expenses': . . . (3) Improvements to the replacement site, *except when required by law*." UMTA Circular 4530.1 § 34(p) at VI-4 (emphasis added). That latter provision, a deviation form the URA's general prohibition of compensation for physical changes or improvements to the displaced person's relocation site, was eliminated in the 1986 amendments to USDOT's relocation regulations and has not since been resurrected. *See, e.g.*, 49 C.F.R. §§ 24.305(j), 24.303(a)(3).

In order to receive federal funds for projects such as the subway construction that forced Supreme's displacement, state and local agencies must certify that they will provide relocation benefits under the URA to affected persons and businesses *See, e.g.*, 42 U.S.C. § 4604. The grantee agency may contract with another public or private agency to administer the relocation benefits, *see id.* § 4632, but the actual grantee remains at all times responsible for assuring that the federal funds are disbursed in compliance with the URA and other governing federal and state laws and regulations, *see, e.g., id.* §§ 4604, 4630. In this case, MTA, the grantee agency,

entered into a third-party contract with HPD, "as agent for MTA," for the purpose of administering URA benefits. The contract states in part that HPD

> shall provide all necessary relocation advisory services and assistance and shall make relocation payments, which are required by Federal or New York State ("State") law or regulation, where relocation from within New York City of a person, business or other entity is required by MTA or any MTA subsidiary or affiliate. All such relocation assistance shall be in accordance with the Federal and New York State laws and regulations which apply to the particular project.

Following its relocation to Englewood in 1981, Supreme filed several claims for URA benefits with HPD. Through 1984, HPD paid Supreme a total of $693,367.31 on those claims, the first $430,991.31 for two separate moving cost claims, and the latter $261,376 for a "physical change claim" stemming from Supreme's construction of off-street parking and related outdoor improvements at the "Lot 2" relocation site. The payments for Supreme's moving expenses is not the subject of the parties' present dispute. The Lot 2 physical change claim, however, also known as the "First Physical Change Claim," is directly related to Supreme's current action to recover URA benefits.

In filing its First Physical Change Claim, Supreme maintained that the outdoor improvements to Lot 2 were compensable relocation expenses because they were "required by law" within the meaning of UMTA Circular 4530.1 § 34(p). Specifically, the parking and other outdoor improvements were required under Supreme's 1982 Site Plan for Lot 2, approval and completion of which were prerequisites to obtaining a Certificate of Occupancy ("C/O") for the location. Supreme, in compliance with these procedures, sought and obtained approval for the 1982 Site Plan from the Englewood Planning Board, which issued a Resolution to that effect on October 26, 1982. The Resolution granted Supreme a waiver

of the normal Englewood zoning requirement that sites the size of Lot 2 contain 94 off-street parking spaces; the Board consented to Supreme's plan to provide only 30 parking spaces, but explicitly

> reserve[d] the power at any time . . . to order such additional construction and paving of off-street parking facilities as . . . determine[d] to be necessary in order to satisfy the parking requirements of the premises.

Once having secured approval for the 1982 Site Plan, Supreme was obliged to complete the work indicated in the Plan and obtain verification thereof in order to receive a C/O for Lot 2. Indeed, HPD paid Supreme $261,376 in compensation for the Second Physical Change Claim on the expectation that this amount did constitute the cost for all of the work indicated on the 1982 Site Plan, and that Supreme would be issued the C/O following its completion. After Supreme accepted the payment, however, authorities from Englewood inspected Lot 2 and prepared a "Certificate of Occupancy Inspection Form," dated November 26, 1984 ("Inspection Form"), which listed 17 items of work that were required to be completed at the site before issuance of the C/O. Although Supreme contends that the items listed on the Inspection Form were new construction and improvement requirements imposed by Englewood, that assertion is not borne out in the record. At HPD's administrative hearing, Englewood's Manager of Engineering Services, Daniel Kingcaid, testified that he prepared the 17-item Inspection Form by comparing what was actually constructed on the Lot 2 site with what was required to be constructed under the 1982 Site Plan, and that the list did *not* contain new items in addition to the requirements under the 1982 Plan. The only item on the Inspection Form that was not indicated on the 1982 Plan was item 17, which required Supreme to submit a letter to Englewood agreeing to pave a certain reserved lawn area if the city decided that parking demands made it necessary. In essence, however, that provision merely restated Englewood's reserved

right to insist that Supreme construct the usually required number of parking spaces on the site.

On January 4, 1985, Englewood issued a C/O to Supreme for Lot 2. The standard form contained three optional boxes indicating "Certificate of Occupancy," "Certificate of Continued Occupancy," and "Temporary Certificate of Occupancy." Only the first of these boxes was checked off; the corresponding legend states:

> This serves notice that said building, structure, or equipment has been constructed or installed in accordance with the New Jersey Uniform Construction Code, and is approved for use and/or occupancy.

That code, in turn, provides that a C/O is a prerequisite to "use[ ] or occup[ation]" of any building or structure, and that no C/O

> shall be issued by the enforcing agency [until] all of the work covered by a construction permit shall have been completed in accordance with the permit, the code, and other applicable laws and ordinances.

N.J. Stat. Ann. § 52:27D-133. The C/O form indicates that a $40.00 payment was received for the certificate, per check number 6750.

According to the testimony at the administrative hearing, HPD officials first learned of the 1985 C/O for Lot 2 only in the course of the 1993-94 hearing itself, when Englewood Building Inspector Donald Porrino produced the original form. Porrino testified that Englewood issued the C/O to Supreme even though all of the 17 work items listed on the November 1984 Inspection Form had not yet been completed, because Supreme had posted a performance bond guaranteeing completion of the work by a May 1, 1985 completion date. As Porrino explained, it was Englewood's practice to issue a C/O upon the posting of such a bond, and "if the work is not done by the completion date, we will use that bond to complete the work. That allows us to issue a final Certificate of Occupancy."

At some point during the spring or summer of 1985, Supreme entered into negotiations to purchase the property at 100 South Dean Street, known as "Lot 3," adjacent to Supreme's location at Lot 2. Supreme purchased Lot 3 in August 1985 for $475,000. On August 26, 1985, Englewood issued Supreme a "Temporary Certificate of Occupancy" for Lot 3—with only *that* box checked off on the standard C/O form—upon the following conditions: (1) that Supreme submit a letter to the Englewood Planning Board by September 16, 1985 requesting a "concept review" for a "combine[d] 80-100 S. Dean Street Plan"; (2) that Supreme submit to the Board a new site plan application for the location by October 18, 1985; (3) that Supreme specify in a letter the completion date for the outstanding items on the November 1984 Inspection Form; and (4) that Supreme complete 7 identified items on the Inspection Form "immediately."

According to the hearing testimony, Supreme had reached an understanding with Englewood whereby Supreme would not be required to complete the work items on the 1982 Site Plan for Lot 2, as prescribed on the Inspection Form, until after it had submitted a new site plan for the combined Lot 2/Lot 3 location. Kingcaid, the Engineering Services Manager, testified that Englewood "told [Supreme] they could wait to do that construction [under the 1982 Plan] until the site plan was resubmitted and we had a final plan of what would be done on lot 2 as well as lot 3"; that "we would hold off on revoking any type of CO on number 80 [Lot 2] since part of the work that was still outstanding in Lot 80 would have to be ripped out and done over again with the site plan, so we did not want to impose an undue burden"; and that "[we] felt that the revised site plan would get everything under control again."

In June 1986, Supreme first approached HPD about receiving URA funding for a "Second Physical Change Claim" corresponding to the work necessary to obtain a C/O for the combined Lot 2/Lot 3 site. Bruce Sykes, an HPD relocation claims official, contacted UMTA to inquire whether

Supreme's Second Physical Change Claim was compensable under the URA. UMTA Regional Counsel Leslie Rogers responded to Sykes's inquiry in a letter dated September 29, 1986. Rogers stated that Supreme might "be eligible for some of the additional items" on its new claim, inasmuch as "*reasonable* expenses incurred as a result of code requirements placed upon the business by the City of Englewood . . . could be paid," (emphasis in original), just as Rogers had previously indicated to Sykes in an October 1983 letter regarding Supreme's First Physical Change Claim. Rogers noted, however, that he had also recommended to Sykes in the earlier letter that Supreme "be held responsible for what is actually mandated by code and what could be considered 'betterments.' " Rogers final recommendations included the following:

1. The same item(s) should not be paid for twice as some of the work may have been completed in 1983.

2. If some of the additional items are a result of changes in the code, Federal participation should be limited to what the code requirements were in October, 1983.

3. New pavement, mandated or not, would represent an improvement and therefore would not be an eligible item.

Supreme submitted its combined Lot 2/Lot 3 site plan, containing 19 more parking spaces than the 1982 Plan, in 1987. The Englewood Planning Board approved the 1987 Site Plan in a Resolution dated October 27, 1987, specifically noting that Supreme "seeks to expand truck parking areas and to improve the traffic flow for its operation." Among other requirements, the 1987 Plan provided that Supreme would post a 24-hour guard with a walkie-talkie system to direct traffic flow and alleviate congestion on South Dean Street.

On October 11, 1988, Supreme formally filed its Second Physical Change Claim with HPD, seeking $276,466 in ben-

efits under the URA for the work mandated by the 1987 Site Plan. In a letter to UMTA dated May 16, 1989, HPD relocation official Simon Rosenbaum requested approval for a payment of $177,530 on Supreme's claim; Rosenbaum had concluded that the remainder of the claim, which was for paving, was a non-compensable "improvement" under the terms of Rogers's letters to Sykes. Rosenbaum considered the $177,530 to be compensable because it represented Supreme's costs to comply with "a mandated code requirement, without which a permanent Certificate of Occupancy will not be granted." He based this determination on his understanding that the "code requirements" necessitating the expenses "were required when [Supreme] moved into [the] premises, since only a temporary Certificate of Occupancy was issued."

Based on HPD's representations, UMTA agreed that Supreme was eligible to receive $177,530 in URA benefits on its Second Physical Change Claim. A disputed issue at the administrative hearing was whether HPD Assistant Commissioner Wilfredo Vargas gave final approval to this recommendation in 1989 and signed off on payment of that amount to Supreme. Nevertheless, for purposes of this litigation the parties entered into a stipulation dated March 6, 1997, stating that HPD did approve and recommend payment of at least the reduced amount of Supreme's claim.

In October 1989, HPD sought the necessary funds from MTA to pay the Second Physical Change Claim. MTA, however, refused to advance the funds without first conducting its own investigation of the claim. In February 1990, MTA advised HPD that it had completed its audit of the claim and had concluded that the entire amount was non-compensable; accordingly, MTA requested that HPD itself reevaluate and disapprove Supreme's claim. HPD did subsequently reevaluate the Second Physical Change Claim, and apparently at least one initial review, by HPD official Sykes, again recommended payment. In the meantime, on November 8, 1990, Englewood issued Supreme a final C/O for its combined Lot 2/Lot 3 site.

Ultimately, HPD Assistant Commissioner Cantillo requested that Al Shehadi, the department's Director of Operations, prepare a final agency determination on Supreme's Second Physical Change Claim. After examining the documentation relating to the claim and meeting with representatives from Supreme, Shehadi concluded that the claim should be rejected in its entirety. Shehadi could not "find that Supreme Oil has shown [that] the work done in conju[n]ction with this claim is directly related to their initial relocation," and thus determined the claim to be "not compensable as a relocation expense." Even though Shehadi had no knowledge of the final C/O for Lot 2 that Englewood had issued to Supreme in January 1985, he nevertheless rejected Supreme's core argument, *i.e.*, that "all of the physical changes done as part of the 1987 Site Plan . . . were required by the City of Englewood" as a prerequisite to "issu[ance] [of] a final Certificate of Occupancy," and that "although HPD paid a previous claim for physical changes to bring the new site up to code," the work done pursuant to 1987 Plan "should also be paid for by HPD because it arose out of two requirements [for additional parking and road widening] that were imposed after the first claim was paid but before a final certificate of occupancy was issued."

Shehadi's denial of the claim was based on the following findings and conclusions: (1) Supreme had adduced "no primary documentation linking the 1987 Site Plan to the 1984 [C/O] Inspection Form" and "no primary documentation . . . stating that the 1982 [Site] [P]lan is defunct and that a completely new Site [P]lan is required"; (2) the 1984 Inspection Form was "essentially a 'punch list' of items not completed as required by the 1982 Site Plan, not a mandate to start construction over from scratch," and the Form contained "no statement whatsoever that work above and beyond the 1982 Site [P]lan is required"; (3) there was "no explanation as to why the 1982 Site [P]lan was abandoned in favor of the 1987 Site Plan" when Supreme had completed essentially 90% of the 1982 Site Plan by the summer of 1984 and "was com-

pensated for complying with it by HPD"; (4) the allegedly newly required road widening easement was "clearly referenced in the 1982 Site Plan drawing, indicating [that] Supreme could have built their plant entrances to accommodate the easement the first time around"; and (5) the 1987 Site Plan "goes way beyond the requirements of the 1984 [C/O] Inspection Report," specifically referencing "both the original lot Supreme relocated to in 1981 and the adjoining lot that was purchased in 1985."

Shehadi also cited "two conceptual considerations." First, the Second Physical Change Claim was non-compensable under the terms of the letter to HPD from UMTA Counsel Rogers, because (a) the claim involved a substantial amount of paving (as already noted by HPD official Rosenbaum); (b) the 1987 Site Plan was drawn up in response to code requirements raised by Englewood after the work on the 1982 Site Plan was essentially completed in 1984, contrary to Rogers's admonition about limiting Federal reimbursement to "what the code requirements were in October, 1983"; and (c) the plan as a whole was a "duplication," in that HPD had already compensated Supreme for the approved 1982 Site Plan to bring the relocation site up to code. Second, the very fact that Supreme had been compensated once before for bringing its site into code compliance counseled against further compensation, in light of URA's policy of reimbursement only for "reasonable" relocation expenses.

As noted, Supreme requested and was granted an administrative hearing in appeal from Shehadi's final agency determination denying the Second Physical Change Claim. Hearing Officer Gottlieb affirmed Shehadi s denial of the claim, for many of the same reasons. For example, Gottlieb credited the testimony of Englewood officials such as Engineering Services Manager Kingcaid that the 17 work items listed on the 1984 Inspection Form had been required by the original 1982 Site Plan for Lot 2 and were not imposed as additional requirements. She emphasized that Supreme had already received $261,376 in URA benefits on its First Physical

Change Claim—ostensibly to reimburse Supreme for the full costs of complying with the 1982 Plan—and that further compensation for the same work would only be duplication. Gottlieb also cited Kingcaid's explanation for why the original work was never completed in accordance with the 1982 Plan: Englewood knew about the purchase of the adjacent Lot 3 and was awaiting Supreme's submission of a revised site plan for the combined Lot 2/Lot 3 location. To the extent that the 1987 Site Plan required new work and expenses, the hearing officer found that Supreme had failed to establish that work such as the construction of additional parking was solely for the benefit of Englewood and was unrelated to its own expansion of its business.

Ms. Gottlieb also considered information and issues not known to or addressed by Shehadi. Most significant, she had available the testimony and documents provided by Building Inspector Porrino concerning the C/O for Lot 2 that was issued to Supreme in January 1985. Gottlieb found "undocumented and unconvincing" the testimony of other individuals that the Lot 2 C/O was anything other than what it purported to be, a permanent C/O carrying with it all the legal implications of such a document. She found that "[a]t no time" had Supreme informed the defendants of the issuance of the C/O, and thus concluded that Supreme had "intentionally withheld evidence" of having obtained it. This critical omission caused officials at HPD "to believe [that Supreme was] not yet in compliance with N.J. code requirements and therefore still eligible for additional reimbursements" under the "required by law" exception—the only avenue through which Supreme could obtain compensation for what were unarguably "enhancements."

The hearing officer also addressed the URA's "reasonableness factor," which had previously been overlooked, and concluded that it too weighed against granting Supreme's claim. She noted the testimony of former HPD claims officials Sykes and Rosenbaum that they had never before recommended compensation for anything more than moving

expenses or the replacement of special equipment. Gottlieb also found that HPD had improperly failed to consider "the huge disparity between the sites in question," referring to the vastly larger facilities to which Supreme had relocated from its original site in Queens.

Finally, Gottlieb stated that she could not consider the issue of whether Assistant Commissioner Vargas had given a "final approval" to Supreme's claim in 1989, because Supreme did not have access to the testimony or documents necessary to establish this fact. She concluded, however, that even if such approval had been given, "it was obtained under false and misleading information provided by" Supreme regarding the issuance (or not) of a C/O for Lot 2.

STANDARD

An action to recover relocation benefits allegedly owed by an administrative agency under the URA is subject to judicial review, if at all, only under the narrow "arbitrary, capricious, . . . abuse of discretion" standard of APA sections 706(2)(A) and (E). *See, e.g., Ackerley Communications of Florida, Inc. v. Henderson*, 881 F.2d 990, 993 (11th Cir. 1989) (finding that "Congress intended that the [APA] would be the exclusive remedy for alleged violations of the URA"); *Nagi v. United States*, 751 F.2d 826, 828-29 (6th Cir. 1985) (reviewing housing agency's denial of relocation benefits under APA §§ 706(2)(A) & (E)); *Pointer v. Villane*, No. 90 Civ. 2979 (RWS), 1991 WL 60346, at *3 (S.D.N.Y. Apr. 12, 1991) (noting that federal jurisdiction over disputes under the URA is granted by the APA, which requires plaintiffs seeking judicial review of those disputes to exhaust their available administrative remedies); *Green v. Urban Mass Transp. Admin.*, 648 F. Supp. 751, 752-53 (S.D. Ohio 1986) (on motion for summary judgment, relevant question was whether agency's "recommendation of [URA] relocation aid met the standards of 5 U.S.C. section 706(2)(A)").

The rules governing this Court's review of final agency determinations under the APA are well established. The Court may set aside an agency s findings, conclusions, or actions only if they are "arbitrary, capricious, an abuse of discretion, . . . otherwise not in accordance with law," or "unsupported by substantial evidence." 5 U.S.C. §§ 706(2)(A), (E). *See also Henley v. Food & Drug Admin.*, 77 F.3d 616, 619 (2d Cir. 1996). The relevant inquiry in determining whether an agency's decision may be deemed arbitrary, capricious, or an abuse of discretion, is whether

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 620 (quoting *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). "[T]he scope of judicial review under this standard is narrow and deferential," and thus to affirm the administrative determination the reviewing court need only

> be certain that [the] agency has considered all the important aspects of the issue and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.

Id. (internal quotations and citations omitted).

Where the court concludes that an agency's final administrative determination meets the standards of APA §§ 706(2)(A) and (E), summary judgment dismissing a plaintiff's challenge to that determination is appropriate, there being "no genuine issue as to any material fact" that would preclude judgment as a matter of law. Fed. R. Civ. P. 56(c).

DISCUSSION

A. *Procedural Due Process*

Preliminarily, the Court rejects Supreme's argument that certain irregularities in the defendants' handling of its claim deprived it of procedural due process, thereby warranting de novo consideration of its action for relocation benefits rather than review under the highly deferential standard ordinarily accorded appeals from administrative determinations. Specifically, Supreme alleges that HPD Director of Operations Shehadi, who issued the January 12, 1993 denial of Supreme's claim, "lack[ed] any familiarity with relocation claims"; that the first HPD-appointed hearing officer, Al Schmidt, conducted pre-hearing talks and discussed document production with the parties for five months, was then replaced by hearing officer Gottlieb, yet ultimately assisted MTA during the hearing; that Schmidt's replacement, Gottlieb, "did not know her official status," *i.e.*, did not know whether her decision would be a "recommendation" or an actual "finding"; and that on the "central" question of the hearing, whether former Assistant Commissioner Vargas had previously approved the very payment that Supreme now seeks, the defendants refused to allow Vargas to testify and refused to produce documents relevant to that question, citing a "deliberative process privilege."

Supreme failed to assert an express procedural due process claim in its amended complaints, and therefore arguably waived its right to make such arguments in opposition to summary judgment. In any event, none of the circumstances described by Supreme—even if true—warrants rejecting the ordinary deference to HPD's administrative determinations.

For example, on the issue of HPD's replacement of the initial hearing officer, the pertinent regulations under which the hearing was conducted, Title 28, § 18-04(d) of the Rules of the City of New York, provide that challenges to a relocation payment determination "will receive a review by the [HPD] Commissioner or his designee, which designee shall not be

one who has participated in the original decision." Thus in this case, nothing prevented HPD's Commissioner from appointing Schmidt as the initial hearing officer and Gottlieb as his replacement, since neither one had participated in the original denial of Supreme's claim by Shehadi. Moreover, the Court agrees with the defendants that Supreme has failed to articulate how it was constitutionally prejudiced during the hearing by the subsequent appearance on the defendants' behalf of Schmidt, who was an HPD attorney; his familiarity with the case as the initial hearing officer suggests no greater prejudice on his part against Supreme than does his status as an HPD employee, which Supreme cannot reasonably challenge.

Supreme's chief procedural complaint, that it was denied the testimony and relevant documents necessary to establish that its claim for relocation benefits had been approved once before by Vargas, is similarly unavailing. Whatever prejudice Supreme suffered from the withholding of this information—even assuming that it was wrongful—was unequivocally cured by the parties' March 6, 1997 stipulation for purposes of this action to the underlying fact that Supreme sought to prove, *i.e.*, that HPD had previously approved and recommended at least partial payment of the relocation claim. In sum, Supreme fails to demonstrate that it was deprived of procedural due process; the Court therefore reviews Supreme's challenge to HPD's denial of its claim with the high degree of deference appropriate to the review of any procedurally regular, final agency determination.

B. *Denial of Relocation Benefits*

Under this Court's limited review of HPD's administrative decision to deny Supreme's Second Physical Change Claim, the Court finds that Supreme has failed to carry its heavy burden of demonstrating that HPD's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. To the contrary, HPD's determination was based on a reasonable interpretation of the URA and its

implementing regulations, and was amply supported by the evidence in the administrative record. Accordingly, the defendants are entitled to summary judgment dismissing Supreme's claim under the URA.

The thrust of Supreme's argument is that its Second Physical Change Claim was compensable under the "required by law" exception of UMTA Circular 4530.1 § 34(p). Specifically, Supreme contends that the 1987 Site Plan included different and additional work requirements—not found on the 1982 Site Plan and caused solely by unforeseen traffic problems outside the plant—which were mandated by the City of Englewood as a prerequisite to Supreme's obtaining a C/O for its property. That argument fails for numerous reasons; indeed, each aspect of the argument is directly contradicted by substantial evidence in the record.

First, in deciding Supreme's claim, HPD officials reasonably interpreted the URA and its implementing regulations to signify that the "required by law" exception had to be read in tandem with, and did not undermine, the overriding policy provisions of the URA itself, that displaced individuals be awarded the "actual reasonable expenses in moving" that directly resulted from their forced relocation. The caveat in Circular 4530.1 stating that its terms "should be read in an advisory sense only," and that the language of the URA "must be consulted" in the event of "differences of interpretation," says as much. In this case, the evidence before the responsible decision makers at HPD showed overwhelmingly that the costs incurred by Supreme under the 1987 Site Plan, the subject of its Second Physical Change Claim, were *not* the direct result of Supreme's 1981 relocation to Englewood and did *not* represent "actual expenses"—much less reasonable ones—of that move.

For example, hearing officer Gottlieb was unquestionably entitled to credit the unequivocal testimony of Kingcaid and other Englewood officials that the work items indicated on the 1984 Inspection Form were substantially the same conditions imposed under the original 1982 Site Plan for Lot 2, as to

which a C/O was issued in 1985. Moreover, even though Englewood did require Supreme to complete the 1987 Site Plan as a prerequisite to obtaining a C/O for the combined Lot 2/Lot 3 site, that burden was one that Supreme brought solely upon itself, through its purchase of Lot 3 and its decision to combine that site with Lot 2 for commercial purposes. Regardless whether Supreme's business actually expanded, which it of course disputes, Supreme still voluntarily chose to purchase Lot 3; and credible testimony at the hearing indicated that Englewood was fully cognizant of Supreme's plans and had reached an understanding with Supreme that completion of the 1982 Site Plan could be suspended pending its submission of a new Site Plan that combined the work requirements for Lots 2 and 3.

In short, the work that Supreme claims to have been "required by law" to perform under the 1987 Site Plan was required only as the result of Supreme's subsequent expansion of its real estate holdings, and not as the result of Supreme's 1981 relocation to Lot 2. That the work underlying Supreme's Second Physical Change Claim culminated in Englewood's issuance of a C/O in November 1990 for "Lot 2 & 3" at "80-100 S. Dean St." confirms this impression.

The most damning evidence in the administrative record, of course, is the fact that Supreme *was* issued a C/O for Lot 2 in January 1985. Whether or not Supreme intentionally withheld this information from HPD officials, as hearing officer Gottlieb found, the legal significance of this evidence cannot be ignored or overstated. Witnessses for both Supreme and HPD were unanimous in their testimony that the issuance of a C/O is determinative on the issue of compensation under the URA—that is, once a C/O issues for a relocation site, the relocatee is no longer entitled to reimbursement for expenditures that it makes at the site. Thus Director of Operations Shehadi stated that

> [a] Certificate of Occupancy is generally observed or generally recognized by this agency [HPD] as an indication that the business that has been relocated is now up

> and permanently running as a business in their new location and that our relocation of them is complete. We have moved a viable business from one place and they are now a viable business in a new location.

Former HPD claims official Rosenbaum explained:

> [t]he Certificate of Occupancy is the last barrier for a company to operate. In other words, if no Certificate of Occupancy is issued for a building you cannot operate in the building and the jurisdiction has the right to close them down. So it was clearly stated if a permanent Certificate of Occupancy is issued, he's in business and our [HPD's] obligation then stops.

And former HPD claims official Sykes testified that when work satisfying Englewood's requirements for a C/O had been completed,

> [t]here would have been no further entitlement to claims after that point and we [HPD] would have been finished, through with Supreme Oil.

The crucial point is that once Englewood issued the C/O for Lot 2, Supreme had obtained approval—signifying satisfaction of all "require[ments] by law"—for the single site *to which it had originally relocated under the URA*; any further expenditures by Supreme at that site or at the combined Lot 2/Lot 3 site, *even if* pursuant to additional legal mandates by the city, would not be compensable under the URA as the direct results and actual costs of Supreme's forced relocation in 1981.

Supreme argues that the 1985 C/O for Lot 2 was not "permanent," and was instead conditioned on the completion of work under the 1982 Site Plan. But the hearing officer was well within her discretion in accepting the C/O for what it purported to be on its face: a permanent, final C/O, carrying with it the legal effect to which the many witnesses testified. Indeed, the presence of the Lot 2 C/O in the record might

alone be sufficient for this Court to affirm HPD's administrative determination. At the very least, given the significance of a C/O in this context, the hearing officer was entitled to discount the evidence of Sykes's and Rosenbaum's recommendations to grant the Second Physical Change Claim, and Assistant Commissioner Vargas's subsequent approval thereof, as based entirely on the misimpression that no C/O for Lot 2 was ever issued.

The Court has exhaustively set forth the facts and the evidence in the administrative record in order to make clear what information was before HPD's officials, particularly Shehadi and Gottlieb, when they made the final determination to deny Supreme's claim. After reviewing that information in detail, the Court has no hesitation in affirming the resultant determination, as the Court is "certain that [HPD] has considered all the important aspects of the issue," that HPD has more than "articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made," *Henley v. Food & Drug Admin.*, 77 F.3d 616, 620 (2d Cir. 1996), and equally as important, that HPD has reached the correct and just result in this case. Supreme received thorough consideration of its claim from the agency, including a full and fair administrative hearing, and has not come close to demonstrating that the outcome of those proceedings was arbitrary, capricious, an abuse of discretion, contrary to law, or lacking in record support.

CONCLUSION

The Court finds that HPD's decision to deny Supreme's Second Physical Change Claim meets the standards of APA § 706(2)(A), and therefore that no genuine issue of fact precludes summary judgment and the defendants are entitled to judgment as a matter of law. Supreme's action to recover benefits under the URA is dismissed. The Clerk of Court shall enter judgment for the defendants.

SO ORDERED:

Dated: New York, New York
September 30, 1997

DENISE COTE

DENISE COTE
United States District Judge